No. 12,668

United States Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER, *Appellant*, vs. STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, *Appellees*.	

BRIEF FOR APPELLEE E. J. ODERMATT.

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STATEMENT OF THE CASE.

We desire to call the attention of the Court to what is probably an unintentional misstatement of the testimony, which appears in Appellant's Statement of the Case at the bottom of page 5 of the brief. Appellant says that Nielson testified, on cross-examination, that he was in the barroom only a matter of seconds while the first storage tank was being filled. At no time did Nielson testify that he was in the barroom before the first underground tank had been completely filled. His testimony commences at page 400 of the record and he definitely said that he filled the first underground tank and then backed his truck into

a position so that he could fill the second or outside underground tank, and that after he had attached the hose from his truck to that second underground tank, he went into the barroom and spent only a few seconds while he purchased a soft drink and consumed a few swallows of it. He then went outside the barroom and completed filling the second underground tank. After that operation had been completed, he disconnected the hose from his truck, drained it by holding the truck end of it high overhead so that its contents would drain into the underground tank, and then he laid the hose on the ground. Immediately following that action, he returned to the barroom for the purpose of making an invoice for the gasoline which he had delivered. We do not find anything on page 440 of the record to the contrary. His whole story, both on direct and on cross-examination, was to the effect that he was not in the barroom more than twice; the first time was after he had started to fill the second tank, and the second time was after that tank had been completely filled.

We shall discuss the specification of errors in the order adopted by Appellant.

I.

The first Specification of Error goes to the refusal by the trial judge to charge the jury as requested by Plaintiff's Instruction No. 1, as follows: "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but

the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California."

The conclusive, although short, answer to that Specification of Error is that there was no evidence to support the requested instruction. In the whole record there is no evidence that Standard Oil Company of California represented to Herzinger that Odermatt was its agent so that Herzinger could rely upon the care or skill of Odermatt or the latter's assistants. Herzinger was on the witness stand a long time, and so was Moseley, his representative in charge of Mineral Hot Springs. Neither of them said anything about such a subject. Plaintiff called Odermatt as for cross-examination and the evidence he gave established that Odermatt was an independent contractor. Plaintiff is bound by that testimony because no contradictory evidence was introduced by him.

The jury could not be allowed to find that Standard Oil Company held out Odermatt as its agent to the extent stated in the requested instruction, when there was no evidence to that effect. The Court rightfully refused the instruction. Merely because a requested

instruction states a sound proposition of law is not a sufficient reason for giving it to a jury in a case where the principle of law there referred to cannot be applicable because of lack of evidence. Appellant fails to point out in his brief any evidence of that nature.

Moreover, the requested instruction was properly refused because it assumes lack of skill on the part of Odermatt and his assistant. The instruction does not contain a necessary phrase to the effect that "If you find lack of care or skill on the part of Odermatt or his assistant", and without that phrase the instruction seems to assume it, and the Court would have been in error in submitting the instruction as worded by Appellant.

II.

When the explanation or instruction supplemental to Instruction No. 22 was given to the jury, plaintiff made only a general objection to a portion thereof, as follows (R. p. 537):

> "Mr. Daly. I think, if the Court please, that the plaintiff will object to the giving of that portion of the explanation requested by the jury of instruction which states that the plaintiff's burden of proving negligence and the proximate cause of the fire is not changed by the rule just mentioned."

The Court will notice that no reason or ground was assigned for the objection. Rule 51 of the *Rules of Civil Procedure* provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis supplied.)

In Rule 20 of this Court it is stated:

> "When the error alleged is to the charge of the Court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial."

The trial judge could not possibly know, from the language of the objection, what might be plaintiff's ground therefor. Counsel did point out the portion to which he objected, but he merely said "Plaintiff will object." Counsel now says that the instruction was misleading, confusing and prejudicial to plaintiff. Those grounds were not stated before the jury retired again to further consider its verdict.

We think the rule precludes this Court from considering this Specification of Error.

Moreover, we respectfully submit that even if Appellant had timely stated the present ground, he would not have stated a sufficient ground.

In *McCue v. McCue,* 123 At. 914 (Conn.), the Court said:

> "The objection to the remainder of the excerpt contained in this assignment, that it is 'incoherent,

misleading and harmful' asserts no proposition of law."

In *Schmuck v. Beck,* 234 Pac. 477 (Mont.), the Court said:

> "* * * the only objections urged to these two instructions, on settlement, are that they are not applicable to the issues and are against the law.
>
> "* * * If an instruction is objectionable, it is the duty of counsel to point out the specific objection on the settlement of the instructions. The questions involved in the objections urged here were hardly presented by the meager objections stated on the settlement in the trial court; this court can only consider the objections made at that time."

In *Jacobs v. Southern Railway Company,* 241 U.S. 229, 60 L.Ed. 970, 36 S. Ct. 588, it was contended that an instruction "did not state the common law doctrine of assumption of risk" and the Court held that the ground was too vague and indeterminate to entitle Appellant to a construction of the point on appeal.

In this exception, Appellant is endeavoring to do a strange thing. Instructions Nos. 21 and 22 were given to the jury in the regular charge without any objection by Appellant. If the jury had reached the same verdict without asking additional instruction by the Court, there is not the slightest doubt that Appellant could not now say that anything in either of those two instructions was wrong. After considerable deliberation, the jury requested more instruction from the Court; the trial judge gave it in the so-called "Ex-

planation of Instruction No. 22". Appellant did object to part of the explanation and he believes, therefore, that such objection related back and applied to the original giving of Instruction No. 22. Appellant was too late; he should have objected when the instruction was first given.

However, if the explanation contained anything not originally included in Instruction No. 22, or that was contrary thereto, Appellant could object to the new matter. The specific portion of the explanation to which Appellant objected is as follows: "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," and Appellant seems to particularly object to the words "the proximate cause of the fire".

The burden of proving negligence unquestionably was upon Appellant. The doctrine of *res ipsa loquitur* provides an inference which the Court stated Appellant could rely upon to supply evidence of negligence. Every plaintiff must show not only evidence of negligence, but that the negligence shown was the proximate cause of the injury.

> "Negligence, no matter in what it consists, cannot create a right of action unless it is the proximate cause of the injury of which complaint is made." 38 *Am. Jur.* 699.

> "It is well settled that in order for negligence to create liability it must be the proximate cause of the injury, and the court in a negligence action in submitting the case to the jury should so instruct the jury." 38 *Am. Jur.* 1079.

In the original Instruction No. 22, to which plaintiff did not originally object, the Court said (R. p. 42):

> "An inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant, E. J. Odermatt or his assistant."

Then the instruction stated:

> "That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant E. J. Odermatt, to rebut the inference by showing that he or his assistant did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure on his part or on the part of his assistant."

Certainly any later reference by the trial judge to negligence would mean such negligence as was the proximate cause of plaintiff's injury. Defendant could have been negligent, but the proximate cause of plaintiff's injury might have been some other agency or negligence. The reference to proximate cause in the subsequent explanation to the jury was merely a repetition of the reference as contained in the original Instruction No. 22.

Appellant confuses "burden of proof" with "burden of going forward with evidence", although he refers to both in his brief. The inference of negli-

gence raised by the doctrine of *res ipsa loquitur* supplies evidence for plaintiff, and thus shifts to defendant the burden of going forward with evidence. If defendant shows no evidence of having exercised due care, under the circumstances, the inference from the doctrine will support a verdict for plaintiff; but if defendant offers any contradictory evidence, it is the duty of the jury, as the trial judge so stated in this case, to weigh the inference against defendant's evidence. Still, the *burden of proof* is upon plaintiff to show negligence, i.e., negligence which was the proximate cause of plaintiff's injury. All this has been well said in 38 *Am. Jur.* at page 1008, as follows:

> "The doctrine does not have the effect of shifting the burden of proof, as distinguished from the burden of evidence, or, as it is sometimes phrased, the burden of proof in the sense of the risk of non-persuasion, as distinguished from the burden of going forward with the evidence; *all the defendant need do is produce exculpating evidence of equal weight.* While many cases would seem to indicate that the burden of proof does shift, nevertheless, upon close examination it is discovered that this is not the actual holding of these cases, but rather is a loose and unguarded use of the term, 'burden of proof.' But the doctrine of res ipsa loquitur does not cast on the defendant the burden of disproving negligence in the sense of making it incumbent upon him to establish freedom from negligence by a preponderance of the evidence. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. The doctrine does not dispense with the requirement that the party who

alleges negligence must prove the fact, but relates only to the mode of proving it. The rule merely takes the place of evidence as affecting the burden of proceeding with the case. The burden of proceeding means the burden of producing evidence, which shifts from party to party as the case progresses. Although the case is one authorizing the application of the doctrine, the plaintiff, nevertheless, must assume the burden of establishing negligence by a preponderance of the evidence. A mere equipoise in the evidence will not entitle the plaintiff to a verdict. If a satisfactory **explanation is offered by the defendant, the plaintiff must rebut it by evidence of negligence or lose his case.**" (Emphasis supplied.)

The application of the *res ipsa loquitur* doctrine to the question of proximate cause has been considered by the Supreme Court of Indiana and decided adversely to the contention of Appellant here. In the case of *Pittsburgh, etc. Ry. v. Arnott,* 126 N.E. 13, the opinion of the Court stated:

"The fourth instruction given by the court was particularly harmful to appellant when considered in the light of the evidence. The instruction is as follows:

'When it is shown that a passenger on a railroad train was injured while being carried, the presumption arises that the injury was caused by the negligence of the carrier, and the burden rests upon the carrier to remove and overcome this presumption.'

* * * * * * *

It is one thing for a jury to find that the accident or condition of which the plaintiff complains was

> due to the negligence of the defendant, and quite another thing to find that such accident or condition produced the injury of which the plaintiff complains. The first is a finding of negligence, and the second is a finding on the question of proximate cause. The rule of res ipsa loquitur applies to the question of negligence, but it has no application to the question of proximate cause. The error in the instruction under consideration is that it applies the rule to both."

In *Palmer v. Hygrade Co.,* 151 S.W. (2d) 548 (Mo. Ct. of Appeals), at page 551, we read:

> "Even under the res ipsa rule it is not sufficient that plaintiff merely show an accident and a resulting injury, but plaintiff must go further with the proof and show that the accident was the result of defendant's negligence. And though plaintiff may do this by circumstantial evidence, that is, by showing that the accident occurred under such unusual circumstances that a reasonable mind would infer therefrom negligence on defendant's part; nevertheless, the burden of proof remains with plaintiff throughout the case."

III.

The third Specification of Error goes to the question of negligence and it suggests that due care was not exercised in the delivery of the gasoline. The gravamen of Appellant's argument on that point seems to be that Nielson violated accepted safety rules and that the Court or jury is bound, therefore,

to decide for Appellant. A careful examination of the rules and the evidence on behalf of defendants discloses that any such violation could not possibly have been the proximate cause of the accident.

The rules, as recognized and approved by defendant's expert witness, Ryan, are as follows (R. p. 520):

> "When deliveries are being made through tank truck hose, employee must stand at the tank truck faucet or nose nozzle valve until the delivery has been completed."
>
> "During filling operations, either into underground storage tanks or at other containers, it is the employee's responsibility to determine that there are no sources of ignition present."

There were two underground tanks at Mineral Hot Springs. Nielson testified (R. p. 409, et seq.), that he filled the inner one, then backed his truck and put it in position beside the outer tank (R. p. 414); then he turned off the motor, took the hose off the truck, inserted the nozzle into the filler pipe of the underground tank, and then attached the other end of the hose onto the outlet valve on his delivery truck. He had been told that the outside tank was empty, but he used a measuring stick to satisfy himself that the statement was correct. That outside tank held 520 gallons of gasoline. The delivery truck contained several compartments, one of which held 300 gallons of gasoline and Nielson then drained it into the underground tank, consuming 10 or 15 minutes. After he made the connection and started the draining of that 300-gallon tank, he left his truck and went into Herzinger's bar

and purchased a soft drink (R. p. 441 and p. 420), and had a "swallow or two". He could see his truck. When he went back to his truck, he discovered that the underground tank had not yet been filled to capacity, so he connected the tank end of the hose to another compartment of his truck, containing 200 gallons, and drained it into the undeground tank, consuming an additional period of 8 to 10 minutes. (R. p. 416.) Then he turned off the faucet and disconnected the hose from that valve. He lifted high that end of the hose to drain it into the underground tank, laid the hose down alongside the cement island, and went inside the bar to make an invoice for the gasoline he had just delivered. (R. p. 416.) (See also Klitz, R. p. 212.) He did not immediately attend to the invoice, but drank more of the soft drink, and then he went to a panorama or moving picture machine, wherein he inserted a coin to make it operate and then he returned to the bar, from where he could see the picture while consuming the remainder of his drink. Then the picture began to flicker (R. p. 420), and a patron at the bar (Klitz) asked the barkeeper if the latter could fix it. The barkeeper replied in the negative and Klitz went to the machine in an effort to fix it. Klitz, a witness for plaintiff (R. p. 212) testified that Nielson had been in the bar on that second occasion "approximately ten minutes, maybe fifteen, something like that", before the picture machine "started to act up". Then Nielson heard someone yell "Hey", and he turned and saw a flash of fire outside the bar.

There can be no denial of the fact that Nielson disobeyed the rule when he left his truck just after he started to fill the second underground tank. But he was gone only a very short time; he said "only a few seconds". He returned to the truck before the 300-gallon compartment had been drained. He remained beside his truck to change the hose to the 200-gallon compartment. Add to those 10 minutes the period of at least 10 minutes which Klitz said Nielson spent in the barroom immediately thereafter, and we have *at least* 20 minutes elapsing from the end of the infraction of the rule to the flash of fire. Nielson said (R. pp. 415, 416) that there was no spilling of gasoline on the ground, and that each time he connected or disconnected the hose to his truck he had to use a wrench.

There is not the slightest room for a thought that Nielson's absence from his truck was in any way connected with the fire. When the flash of fire came, Nielson had completely finished and had disconnected the hose from his truck and laid it on the ground. The rule applies only during the delivery or flow of gasoline. Certainly Nielson was not negligent or in violation of any rule when he left the truck to make his invoice after filling the tank, nor did the rule prohibit him from enjoying a soft drink and a picture while attending to the invoice. Appellant's reference to the rule is merely an effort to becloud the issue.

As to the other rule, all the evidence on Appellant's side was to the effect that there was nothing in use or operation about the premises which would have caused

the ignition of the gas vapor. We must bear in mind that all the premises, except the gasoline pumps, were under the control of Herzinger and not any defendant. If Appellant had shown the existence of an agency which could have caused ignition of the vapor, Nielson would have violated the rule if he did not look for it, and he would have been negligent if he did not find what he ought to have seen. But Appellant's own evidence established the fact that there was nothing; consequently if Nielson failed to look, no harm resulted. Moreover, the rule says "During filling operations", and the uncontradicted evidence is that both underground tanks had been filled and the hose disconnected from the tank truck and laid on the ground at least ten minutes before the fire occurred. The rule does not say that making an invoice is part of "filling operations".

On page 27 of the brief, Appellant says:

> "we submit that it is most logical to believe that if the nozzle of the hose was still in the filler pipe to the underground tank, that gasoline was being delivered through the hose at the time the fire began."

Nobody testified that the truck end of the hose was attached to the truck at the time the fire flashed, and Nielson positively said it was detached and on the ground. We are unable to understand how gasoline could continue to flow from the tank truck through that hose unless the hose was attached to the truck. Anyway, it was for the jury alone to determine the facts.

The only evidence the defendants could present to rebut the inference under the *res ipsa loquitur* doctrine (assuming that the doctrine is applicable) was for Nielson to tell what he did. He told it, and we respectfully submit that his story shows he did what was customarily and usually done, and that he exercised due care under the circumstances. (See testimony of witness Harmer, R. pp. 461, 462.)

IV.

Appellant's Specification of Error No. IV must not be permitted to mislead. A careful reading of it, as it is stated on pages 9 and 10 of the brief, reveals that the first part of the quotation from the record must be ignored, because Appellant's objection was fully sustained. The specification should not receive consideration beyond the scope suggested by Appellant himself when referring to it in his Statement of the Case (see bottom of page 6 of brief) and again in his printed argument (page 40 of brief). The latter reference is as follows:

> "The witness was permitted to say in substance that he could see no possibility of a fire emanating in or about the truck without some outside agency, light or fire. * * *"

Appellant does not there refer to what he says is the objectionable portion of that Specification of Error wherein the words "from your hearing and observation of the testimony already offered in this case" were used in the previous question.

The alleged error by the Court below was in permitting witness Ryan to be asked and to answer as follows on redirect examination (R. p. 522):

> "Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?
>
> Mr. Parry. Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all.
>
> The Court. Objection will be overruled.
>
> A. I can see no such possibility."

Immediately prior to that question was one wherein Ryan was asked: "From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?" Appellant's objection to that question was sustained. Then the witness was asked the question first quoted above, which is the subject of this Specification of Error. It will be noticed that the second is a very different question than the previous one which had been ruled out. The second one has no reference to any of the testimony already offered in the case. When the Court ruled out the previous question containing such reference, the whole question was eliminated, and the last question stood as stated and could not have carried with it any part of the previous question which had been ruled out by the Court. Appellant incorrectly attempts to attach the phrase "from your hearing and observation of the testimony already offered in this case" to the second question.

We respectfully submit that it is an improper distortion.

The question and answer to which Appellant objects were merely a repetition of what had been developed during the prior examination of Ryan without objection by Appellant. On page 500 of the Record, there appears Ryan's statement of the three elements of fire. There he was asked:

> "* * * how, from a scientific viewpoint, would it be possible to ignite gasoline or gasoline vapors? In other words, would it require some outside agency?"

He answered: "Definitely."

Then the Record shows this, at page 501:

> "Q. In other words, as I understand it, in order to ignite gasoline or gasoline vapors, it would be necessary that an outside agency of fire come in contact with the vapor or the gasoline?
>
> A. Well, heat in some form; we will say a flame or a spark or a hot surface.
>
> Q. A hot surface?
>
> A. That's right.
>
> Q. But outside of those three outside agencies, gasoline or the vapors would not ignite?
>
> A. That is correct."

On page 503 of the Record, there appears a long hypothetical question which contains a statement of evidence previously received concerning the physical conditions existing at the time of the fire. Indeed, counsel for Appellant interrogated Ryan about the three elements of fire (combustible material, air, and

a source of ignition) and asked this question (page 518):

> "Q. We had combustible material and oxygen there, so the question comes to the point of ignition. Now then a fire would have to start at the point of ignition?
>
> A. That is right."

We think the question now argued involved nothing more than a further inquiry concerning the point of ignition. We repeat,—the question was not based upon any hearing or observation of the witness of other testimony, nor was his answer. All facts in the case necessary to answer that question had been given to Ryan during his previous examination.

It is respectfully submitted that there was no error on the part of the court below and that the judgment in this case should be affirmed.

Dated, Reno, Nevada,
March 5, 1951.

Respectfully submitted,
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